delay of 3½ years would certainly make a lot of difference in the value of land in and around a developing town like Kuantan. The legislature had finally recognised that there had been undue delay in many land acquisition cases and that such a delay would act as an injustice to the landowner. With that in mind it amended section 8 of the said Act by inserting a new sub-section (4) which provides that a declaration under sub-section (1) of section 8 of the said Act shall lapse and cease to have any effect on the expiry of two years after the date of its publication in the Gazette of which the Collector has not made any award. In other words, the legislature has now deemed it fit to restrict the time to only two years for awards of compensation to be made after a gazette notification under section 8 of the said Act. It must be emphasised that this amendment has no application to the instant case because it came into effect only in January 1984, nevertheless I am of the view that the amendment is certainly a guiding light in the corridor of darkness as to what should be "convenient speed".

In my judgment in the present case, as there is no evidence upon which the Court can act to consider that the delay of 3½ years is reasonable, it is left in the dark as to why there was such a delay. In the absence of any reasonable explantion, it is my judgment that the delay of 3½ years is unreasonable and has caused an injustice to the landowner because the award given by the Collector in March 1983 was based on the market value of the land in August 1979. Such a delay tantamounts to an abuse of power which renders the enquiry and all subsequent proceedings null and void. Accordingly, the award of the Collector made on March 25, 1983 is hereby called in and quashed. The cost of this motion is to be taxed and paid by the Collector.

Order accordingly.

Solicitors: *Presgrave & Matthews.*

CHOY CHEONG v. KIEW KIM

[A.C.J. (Wan Hamzah J.) July 27, 1984]
[Kuala Lumpur – Civil Appeal No. 3 of 1983]

Family Law – Maintenance – Deed of dissolution of marriage – Clause providing wife solely responsible for maintenance of children – Validity of clause.

Jurisdiction – Maintenance claim – Whether magistrate had jurisdiction to hear on issue of validity of dissolution of marriage – Subordinate Courts Act 1948 (Revised 1972), s. 69(k).

The respondent made a complaint to the magistrate against the appellant, the respondent's husband, alleging that he had neglected to provide maintenance for her and her three children. She asked that the appellant be ordered to pay maintenance for her and the children from January 1981. The appellant's main ground of defence was that they had executed a deed of dissolution of marriage and therefore she was no more his wife. The magistrate proceeded to hear on the issue of the validity of the deed of dissolution of marriage. She held that the respondent succeeded in her contention of *non est factum*, and the magistrate made an order of maintenance of $2,000 per month for the respondent and the three children with effect from January 1982.

The main ground of appeal was that the magistrate had no jurisdiction to hear and determine the question of validity of the dissolution of marriage in view of section 39(k) of the Subordinate Courts Act 1948 (Revised 1972).

Held: (1) the magistrate had jurisdiction to consider and determine the issue of the validity of the deed of dissolution;

(2) however, the magistrate's finding should be set aside as being perverse, and the proper finding should be that the respondent had voluntarily signed the deed fully aware that it was a deed of dissolution of marriage;

(3) since the marriage was dissolved as from December 17, 1980 (the date of the deed) the respondent was no more entitled to maintenance as from that date;

(4) however, the appellant could not relieve himself of the responsibility to provide maintenance for the children merely by inserting clause 5 in the agreement. There was no evidence to show that he had provided for the children assets or investments from which income would be obtained for the maintenance of the children;

(5) the magistrate's orders should be substituted with an order that the appellant should pay the respondent $300 per month for the maintenance of the three children commencing from February 1981 until they reach their respective age of majority.

Cases referred to:

(1) *R. Muthu Thambi* v. *K. Janagi* [1955] M.L.J. 47.
(2) *Che Wah* v. *Mohamed Yassin* [1957] M.L.J. 39.

CIVIL APPEAL.

Miss K.C. Chai for the appellant.
H.Y. Lee (Legal Officer, Legal Aid Bureau) for the respondent.

Cur. Adv. Vult.

Wan Hamzah J.: The Respondent made a complaint to the Magistrate alleging that she was the wife of the Appellant and that the Appellant had neglected to provide maintenance for her and their three children. She asked that the Appellant be ordered to pay maintenance for her and the children from January 1981. The Appellant's main ground of defence was that they had executed a deed of dissolution of marriage and therefore she was no more his wife. In her affidavit the Respondent stated:–

Paragraph 11:

"The Respondent (i.e. the Appellant in this appeal) told me that he agreed to give me only $50,000.00 and not $80,000.00 as I had asked for. However, he laid down two conditions i.e. (i) I must not nag him again over his third wife and (ii) I must sign for the $50,000.00 at his lawyer's office, which I agreed.

Paragraph 17:
"It was at the Social Welfare Department that I first learnt of the Deed of Dissolution of Marriage between me and the Respondent as when I signed it at the Respondent's lawyer's office the Respondent told me that I was merely to sign a receipt for the acknowledgment of the $50,000.00 given to me for the purpose as agreed under paragraph II of this affidavit herein. I never knew that it is a deed of dissolution of our marriage that I was signing; otherwise I would not have signed it. I have never been given a copy of the aforesaid deed since then."

When the case came up for trial the Magistrate proceeded to hear on the issue of the validity of the deed of dissolution of marriage. She held that the Respondent succeeded in her contention of *non est factum*, and the Magistrate made an order of maintenance of $2,000 per month for the Respondent and the three children with effect from January 1982.

The main ground of this appeal is that the Magistrate had no jurisdiction to hear and determine the question of validity of the dissolution of marriage in view of section 69(k) of the Subordinate Courts Act, which reads –

"Sessions Courts shall have no jurisdiction in actions, suits or proceedings of a civil nature –

(k) except as specifically provided in any written law for the time being in force, wherein the validity or dissolution of any marriage is in question."

(By section 93 the provision of section 69 (k) applies also to Magistrates' Courts). But I am persuaded to follow the decisions of the High Court in *R. Muthu Thambi* v. *K. Janagi*[1] and *Che Wah* v. *Mohamed Yassin*[2] and accordingly to hold that the Magistrate had jurisdiction to consider and determine the issue of the validity of the deed of dissolution. However I do not think that I can accept the Magistrate's finding. The deed of dissolution of marriage (Exhibit D4) shows that it was signed by the Appellant and the Respondent in the presence of Mr. Chong Tho Chin, advocate & solicitor. Mr. Chong Tho Chin gave evidence before the Magistrate as a witness for the Appellant. He testified, *inter alia*, as follows:–

"P.W.1 (i.e. the Respondent) and D.W.1 (i.e. the Appellant) are known to me. D4 is drawn up by me. The contents of D4 were explained to P.W.1. It is attested by me. I spoke to them in our own dialect. She appeared to understand at the time. She received a duplicate copy of the agreement . . . . . P.W.1 and D.W.1 came to my office on no less than three occasions. They talked over the terms of the agreement. D.W.1 offered $40,000 and I even tried to help P.W.1 get more since I know P.W.1 personally. P.W.1 did not tell me that she had understood that she was signing a receipt for the money and not agreement. I had explained the terms to her . . . . . I explained the agreement in Hakka. . . . ."

The Magistrate's Statement of the Grounds of Decision does show that she took into consideration the evidence of Mr. Chong Tho Chin. There was not the slightest suggestion of any valid reason why his evidence should be disregarded. If his evidence is taken into consideration, it will be found that the Magistrate's finding is very much against the weight of evidence. Although according to the evidence of the Welfare Officer (P.W.2) the Respondent was shocked, worried and angry with the Appellant when she was told the contents of the deed by the Welfare Officer, the evidence of Mr. Chong Tho Chin is too overwhelming to be brushed aside, he being an advocate and solicitor and an independent witness. Therefore in my judgment the Magistrate's finding should be set aside as being perverse, and the proper finding should be that the Respondent had voluntarily signed the deed fully aware that it was a deed of dissolution of marriage. Since the marriage was dissolved as from December 17, 1980 (the date of the deed) the Respondent was no more entitled to maintenance as from the date.

As regards maintenance for the children, clause 5 of the deed reads:–

"The Wife shall be entitled to and solely responsible for absolute custody, control, education and maintenance of the children . . . . . during their minority."

In view of this clause the Appellant maintained that he was not responsible to provide maintenance for the children. In my opinion he cannot relieve himself of the responsibility of providing maintenance for the children merely by inserting the above clause in the agreement. The deed does not show that he paid a lump sum for the maintenance of the children for any period of time. Although he paid $50,000 to the Respondent under the deed, that was consideration for the dissolution of the marriage. There is no evidence to show that he had provided for the children some assets or investments from which income would be obtained and used for the maintenance of the children.

In her affidavit the Respondent alleged that the Appellant had not given maintenance since February 1981. In his evidence the Appellant stated:

"Since signing the agreement I have made contribution to their (the three children's) maintenance. P.W. 1 (i.e. the Respondent) asked for it and I gave her $300 per month. This $300 is voluntary payment since P.W. 1 said she does not have enough."

Apart from this the Appellant did not adduce further evidence to show that he had been paying $300 per month for the maintenance of the children. In the Appellant's affidavit in reply date June 10, 1982 no reference was made to this alleged payment of $300 per month. Evidence shows that the Respondent went to see the Welfare Officer on February 21, 1981 to complain about non-payment of maintenance. Therefore in my opinion it is fair to accept the Respondent's allegation that maintenance had not been given since February 1981. Considering the size of the business that the Appellant has been carrying on and his income from the business, in my opinion it is fair that he should pay maintenance of $100 per month per child. Therefore I order that the Magistrate's orders be substituted with an order that the Appellant should pay the Respondent $300 per month for the maintenance of the three children commencing from February 1981 until they reach their respective age of majority.

In addition to the Respondent's affidavit of complaint dated March 4, 1981 and the Appellant's affidavit in reply dated June 10, 1982, three other affidavits dated July 17, 1982, July 20, 1982 and July 26, 1982 are included in the record of appeal. These three affidavits were deposed to after the Magistrate had heard the case and given her decision on July 7, 1982. It appears that these three subsequent affidavits were filed in connection with an application for stay of execution pending appeal. At the hearing of this appeal no application was made to this Court to admit the three subsequent affidavits as additional evidence. Therefore for the purpose of this appeal the three subsequent affidavits should be disregarded.

Costs to the Appellant in respect of the appeal.

Order accordingly.

Solicitors: *K.C. Chai & Co.; Legal Aid Bureau.*

E.W. TALALLA v. NG YEE FONG & ANOR.

[O.C.J. (Wan Hamzah J.) September 7, 1984]
[Kuala Lumpur – Civil Suit No. 3079 of 1977]

Land Law – Encroachment of land – Action for order to remove part of house and septic tank – Whether action was time-barred – Limitation Ordinance 1953, s. 9(1) – National Land Code, ss. 282-284, 286 & 341.

Land Law – Easement – There must be express grant – Acquiescence not sufficient to create easement.

The plaintiff was the owner of land lot No. 179, Section 98, Kuala Lumpur Town, on which there was a house No. 11. The defendants were owners of land lot No. 126, Section 98, Kuala Lumpur Town, which was adjoining to the plaintiff's land lot. No. 179. A part of the defendant's house No. 75A encroached onto and was situated on the plaintiff's land.

The plaintiff brought an action against the defendants and asked for an order that the defendants should remove that part of that house No. 75A which had been erected on the plaintiff's land and that the defendants should also remove their septic tank from the plaintiff's land.

The defendants' defences were firstly that the plaintiff had been aware of the encroachment of the house No. 75A and the siting of its septic tank since 1955 and this suit which was filed in 1977 had been time-barred under section 9(1) of the Limitation Ordinance 1953. Secondly, after the plaintiff became owner of the land he did nothing